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No. 1124

# In the Supreme Court of the United States

OCTOBER TERM, 1945

R. E. SCHREFFLER, DOING BUSINESS AS SCHREFFLER STEEL & SUPPLY CO.; AND BYRON G. ROGERS, GUARDIAN AD LITEM, PETITIONERS

*v.*

PAUL A. PORTER, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## AUTHORITIES



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### OPINION BELOW

The opinion in the Circuit Court of Appeals for the Tenth Circuit (R. 61–66) is reported in 153 F. 2d 1. No opinion was rendered by the District Court.

### JURISDICTION

The judgment of the Circuit Court of Appeals (R. 66) was entered on January 12, 1946. A petition for rehearing (R. 66–68) was denied on

February 23, 1946 (R. 68). The petition for writ of certiorari was filed on April 16, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

### QUESTIONS PRESENTED

(1) Whether the contracts pleaded in the Eighth Defense alleged in the answer were contracts of sale or contracts of employment.

(2) Whether an action to recover statutory damages under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, may be brought after the expiration of one year from the date of the making of the contract for the sale of a commodity alleged to have been sold at a price in excess of the legal maximum price when less than a year has elapsed since the date on which the commodity was delivered.

(3) Whether the affidavits submitted by the respondent were sufficient to sustain the summary judgment.

### STATUTES AND REGULATIONS

The action involves the Emergency Price Control Act, as amended,[1] Revised Price Schedule No. 49,[2] and Rule 56 of the Rules of Civil Pro-

[1] 56 Stat. 23, 58 Stat. 632, Public Law No. 108, 79th Cong., 1st sess., 50 U. S. C. App. 901 et esq.

[2] 7 F. R. 1300; 8 F. R. 4608, 7257.

cedure. The pertinent provisions of each are set forth in the Appendix.

## STATEMENT

The amended complaint (R. 11–19) alleged that the defendant between April 17, 1943, and February 17, 1944, had sold iron and steel products at prices in excess of the maximum price established by Revised Price Schedule No. 49 to various purchasers none of whom purchased the products for use or consumption other than in the course of trade or business. Attached to the complaint as Exhibit "A" (R. 15–19) was a compilation showing the names of purchasers, the purchase order numbers, the dates of shipment, the invoice numbers, the net cost to purchasers, the allowable cost to purchasers, the amount of overcharges on each item, and the total overcharges. Judgment was demanded for three times the amount of the overcharges.

The defendant's answer (R. 26–42) contained nine defenses, of which only the first, third, fourth and eighth are material to a consideration of the petition for certiorari. The first defense denied generally the material allegations of the amended complaint; the third and fourth defenses pleaded that the action was barred by the one year limitation prescribed by Section 205 (e) of the Emergency Price Control Act, as to certain of the items alleged to have been sold at prices in excess of the legal maximum. The Eighth Defense alleged:

That for the period beginning April 17, 1943 and ending February 17, 1944, the time alleged in paragraph 5 of the Amended Complaint as the interim in which the alleged violations complained of were committed, and prior thereto, the said R. E. Schreffler was not engaged in the business of buying, selling, and reselling Iron and Steel products and therefore was not amenable to Revised Maximum Price Regulation No. 49, but on the contrary was in the hire and employ of Aircraft Mechanics, Incorporated, of Colorado Springs, Colorado, as a "material expediter" pursuant to a written contract, a copy of which is hereto attached and made a part hereof and marked "Exhibit 4" and was, during all times complained of in paragraph 5 of the Amended Complaint, in the hire and employ of the Douglas Aircraft Company, Inc., Los Angeles, California, in a similar capacity pursuant to an oral contract, the terms and conditions of which were substantially the same as those recited in "Exhibit 4" hereinabove referred to.

Attached to the answer as Exhibit 4 was a letter (R. 38) addressed by Aircraft Mechanics, Inc., to Schreffler Steel and Supply Co., Inc., a corporation, setting forth the terms of an agreement under which the latter was to deliver iron and steel products to the former. The agreement provided that the Schreffler Steel and Supply Co. Inc. would buy, pay for, store and deliver to Air-

craft Mechanics Inc. iron and steel products, rendering its bill to the latter for the cost of the products plus $2.00 per hundred weight.

The respondent moved for summary judgment for single overcharges (R. 42–47) and submitted in support of the motion affidavits of Cyrus J. Kephart, a Price Specialist and Analyst in the Office of Price Administration, and of Richard E. Myers, a Price Clerk in the Iron and Steel Price Branch of the Office of Price Administration, who detailed the procedure employed by them in the preparation of Exhibit "A" to the Amended Complaint (R. 48–51). The petitioners served no responsive affidavit. The motion for summary judgment was granted (R. 51) and final judgment was entered thereon (R. 52). On appeal, the Circuit Court of Appeals for the Tenth Circuit affirmed the Judgment (R. 61–66).

## ARGUMENT

(1) The Eighth Defense raised no genuine issue of fact but only a question of law, which the Court below correctly resolved. The petitioners rely on the letter (Exhibit 4 (R. 38–42)) from Aircraft Mechanics, Inc., addressed, not to the petitioners, but to a corporation which is not a party to the action. They argue that that agreement was a contract of employment and that, therefore, in making deliveries of iron and steel products to the Aircraft Mechanics Inc. they were not selling the products, and accordingly that they could not

be held liable for statutory damages under Section 205 (e) of the Act.

The construction of the contract was a question of law for the court, and not a question of fact for a jury. The alleged agreement was clearly not an employment contract but a contract of purchase and sale. The mere fact that it was denominated an agency or employment contract was insufficient to change its true character. "Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law." *United States* v. *City and County of San Francisco,* 310 U. S. 16, 28.

Under the provisions of the agreement the so-called employee was to purchase and pay for the iron and steel, store it, and deliver it to the alleged employer for a price equal to the cost to the alleged employee plus the sum of $2.00 per hundred weight. The prices and terms of purchase were to be fixed by the alleged employee (par. g), who assumed the risk of loss (pars. e & f) and was vested with complete control of the products. He was to invoice all deliveries to the alleged employer (par. g); "to furnish warehouse or storage facilities * * * and to handle all transfers and billings" (par. i); and hire all clerical and other assistance necessary and to pay the expenses thereof (pars. j. & k). The alleged employer had no right to control the meth-

ods and means employed by the alleged employee in carrying out the contract nor was the alleged employee bound to deliver all the iron and steel he purchased to the alleged employer (witness the 18 other customers). The value of the alleged "services" bore no relationship to the "compensation" which the alleged employee was to receive. The compensation was fixed solely on the basis of the quantity of iron and steel delivered. On occasion, one or more of the foregoing provisions may be found in any agency or employment contract. But when all of these elements clearly negativing a subordinate relationship coalesce into one agreement, only one construction is possible. The conclusion that the agreement here was one of purchase and sale is inescapable.

(2) Petitioners' contention that the action with respect to certain of the items for which recovery was allowed was barred by the one year limitation prescribed by Section 205 (e) is plainly without merit. Petitioners alleged that those items were not sold within one year from the date of the action, although they were admittedly shipped to the purchasers within that period. Section 205 (e) provides:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence

> of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *

Section 302 (a) of the Act defines the terms sale and selling as follows:

> The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

Section 4 (a) of the Act provides:

> It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2. * * *

Revised Price Schedule No. 49 provides that no person shall "sell, offer to sell, deliver or transfer" iron or steel in excess of the maximum prices prescribed thereby. Section 1306.151.

Under the foregoing provision, the sale, and the delivery each constituted in and of itself an independent violation for which the Administrator was entitled to maintain an action under Section 205 (e). *United States* v. *Lutz,* 142 F. 2d 985 (C. C. A. 3rd). While but one recovery could be had, the action to effect such recovery was seasonably brought if commenced within one year from the date of the violation latest in point of time. The fact that the statute of limitations has run in respect to the offense of agreeing to receive a bribe will not bar a prosecution for the offense, subsequently committed, of actually receiving the bribe (*United States* v. *Driggs,* 125 Fed. 520 (C. C. E. D. N. Y.)); nor will the fact that a cause of action for an earlier conversion is barred by the statute of limitations defeat an action for a subsequent conversion of the same property by the same bailee (*Ganley* v. *Troy City National Bank,* 98 N. Y. 487; *Wilkinson* v. *Verity,* L. R. 6 C. P. 206); nor will the fact that the statute of limitations has run on a cause of action on an implied promise to refund illegally collected taxes defeat an action for the recovery of the same taxes based upon a subsequent express allowance of a claim for the refund thereof (*Bonwit Teller & Co.* v. *United States,* 283 U. S. 258). The rule is thus well established that where the law creates two or more rights (as distinguished from remedies) the

fact that the statute of limitations has run on one of such rights will not bar an action based on a subsequently accruing right to the same recovery or relief. Williston, *Contracts* (Rev. Ed.), Sec. 2031. Consequently, the fact that more than a year had elapsed since the contract of sale does not defeat an action brought within one year from the dates of the delivery of the commodities.

3. The affidavits submitted in support of the motion for summary judgment were, contrary to petitioners' contention, clearly sufficient to support the judgment. The affidavit of Cyrus J. Kephart states (R. 49):

> Pursuant to instructions received by me from my superiors, I attended at the defendant's place of business in Denver, Colorado, during the month of July 1944 for a period of approximately three weeks. While there, I examined the defendant's records relating to the sale of iron and steel products, and insofar as the same were made available to me I examined the defendant's invoices, customers' purchase orders, freight bills, correspondence, and all other records, papers and accounts relative to this litigation. In addition, I examined defendant's own purchase orders, and invoices issued to him by his suppliers, together with the records insofar as appropriate, kept and maintained by the carriers which transported the material sold by the defendant, and which is the subject matter of this suit.

> I collated and assembled all of the data so obtained and from the same prepared exhibit "A", which is attached to and made a part of the plaintiff's complaint.

The compilation attached to the complaint (Exhibit "A") which states the particulars of the claim against petitioners is, therefore, nothing more than a transcript of records of the petitioners and the carriers who transported the material which the petitioners sold at excessive prices. Such a compilation was clearly admissible in evidence. *Augustine* v. *Bowles,* 149 F. 2d 93 (C. C. A. 9); *McDonald* v. *Bowles,* 152 F. 2d 741 (C. C. A. 9); Wigmore, Evidence, 3d Ed., Vol. 4, 1230.

The records from which the compilation was prepared were either in petitioners' possession or as readily available to them as to the respondent. Furthermore, the record shows that "there was supplied to said defendant all and singular the accountant's work sheets relating to each and every sale, transaction or item involved in suit, specifying all the factors of permissible charge, as well as all items of overcharge, freight rate allowances, etc., as well as analyses of items shipped." (R. 22).

In face of all of the foregoing, the petitioners did not submit any affidavits or other proof challenging the correctness of the compilation. In these circumstances, the compilation must be

accepted as true. Compare, *McDonald* v. *Bowles*, *supra*.

The affidavits contain averments of all the essential facts necessary to establish the correctness of the compilation. Any statements of conclusions or opinion in the affidavits are mere surplusage. If they are stricken entirely from the affidavits, the affidavits would still be sufficient to support the judgment.

### CONCLUSION

The judgment of the court below was clearly right. It is not in conflict with the decision of any other court. No question requiring review by this Court is presented. The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. HOWARD MCGRATH,
*Solicitor General.*

GEORGE MONCHARSH,
*Deputy Administrator for Enforcement.*

MILTON KLEIN,
*Director, Litigation Division.*

MAY 1946.